

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANNY CAVIC,

Plaintiff and Appellant,

v.

TODD A. GREEN et al.,

Defendants and Respondents.

G046772

(Super. Ct. No. 30-2011-00522908)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Danny Cavic, in pro. per., for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

*

*

*

Danny Cavic appeals from an order granting a special motion to strike his complaint against Todd A. Green and Green, LLP (Green) as a SLAPP action.¹ In the complaint, which stated only a single cause of action against Green, Cavic alleged that Green, while acting as attorney for Cavic's opponent in an earlier case, improperly communicated with Cavic's retained expert witness and dissuaded the expert from testifying in the case.

Cavic contends the trial court erred in determining his cause of action against Green arose out of protected speech. In Cavic's view, Green's alleged misconduct was not merely "speech," but would more accurately be described as "conspiratory acts and conduct to gain an unfair advantage in litigation." We find the distinction unpersuasive, however, as Cavic is simply conflating what Green did – speak to the expert – with his alleged motivation in doing it. It is the former which is relevant in determining whether a cause of action arises out of protected activity for purposes of the anti-SLAPP law.

Cavic also argues the trial court erred in determining he failed to establish a probability of success on the merits of his claim against Green. Again, we disagree. The evidence presented to the trial court in connection with the motion to strike established only that Green had communicated directly with Cavic's expert in the earlier case, but not that Green either caused the expert to alter his testimony or dissuaded him from testifying at all. Absent such evidence, Cavic could not demonstrate a probability of succeeding on the merits of his claim.

Finding no error in the trial court's ruling, we affirm its order striking Cavic's complaint against Green.

¹ A "SLAPP" action is a "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

I

FACTS

Cavic filed his first amended complaint in December 2011. It contained five causes of action alleged against 10 defendants. The only cause of action alleged against Green was the fifth cause of action, entitled “Legal Malpractice – Interference with Attorney-Client Relationship.” According to the complaint, Cavic had been a party to a prior lawsuit, which later resulted in a mistrial. Cavic had been represented by three separate attorneys “at various and separate times during the Lawsuit,” and Richard Squar “was retained by [Cavic] as a key ‘expert witness.’” Green, who was opposing counsel in the case, communicated with Squar on multiple occasions before trial. During those alleged communications, Green persuaded Squar to change his testimony, which damaged Cavic’s case, and subsequently persuaded Squar not to testify at all – thus causing the mistrial. Cavic alleged Green should be held liable for “intentionally interfer[ing] with [Cavic’s] privileged attorney-client relationship.”

In January 2012, Green moved to strike the lawsuit as a SLAPP action pursuant to Code of Civil Procedure section 425.16. He argued that because his alleged wrongdoing was comprised entirely of purported conversations he had with Squar, the cause of action arose out of his protected speech and was thus the proper subject of a motion to strike under the anti-SLAPP law. On the merits, he offered a declaration in which he described his brief communications with Squar. Green stated he had contacted Squar directly, with the permission of Cavic’s then counsel, to schedule Squar’s deposition. During Squar’s deposition, Green questioned him about various matters, and Squar identified another case in which he had acted as an expert witness on issues similar to those at issue in their case. The day after the deposition, Green sent an e-mail to Squar, with a copy to Cavic’s counsel, asking for a copy of Squar’s expert report in the other case. Squar apparently did not feel comfortable providing information directly to

Green, and complained to Cavic's counsel about it. Green had no further direct communication with Squar.

Cavic opposed the motion, and provided copies of the e-mail communications between Green and Squar, and between each of them and Cavic's counsel, reflecting Green's request for the expert report from Squar and their ensuing discussion about whether that request had been appropriate. Cavic also provided his own declaration which stated, in part: "When attorney Todd Green made the conduct of multiple ex-parte contacts with my expert witness Richard Squar to demand the production of documents and asking for information, he did some conduct or action that caused my expert witness to reduce his initial damages estimate and then decide[] not to testify at all, causing me harm to my case."

The trial court granted the motion to strike, finding that (1) Cavic based his lawsuit against Green on Green's communications about the pending lawsuit – communications which were protected under the anti-SLAPP law, and (2) Cavic had shown no probability of prevailing on the merits of that claim.

II

DISCUSSION

A. *The Anti-SLAPP Law*

The anti-SLAPP law, Code of Civil Procedure section 425.16 (section 425.16), provides a summary mechanism to test the merit of any claim arising out of the defendants' protected communicative activities. The law authorizes courts to strike any cause of action which falls within the statute's purview, if the plaintiff cannot demonstrate a probability of prevailing on it.

Section 425.16, subdivision (b)(1), requires the court to engage in a two-step process in determining whether a defendant's motion to strike should be granted. "First, the court decides whether the defendant has made a threshold showing

that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.)

Then, only if the court finds that defendant has made such a showing, the burden shifts to plaintiff to demonstrate "there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568.)

We review an order made pursuant to the anti-SLAPP law on a de novo basis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 ["Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal"]; *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 628-629.) "While we are required to construe the statute broadly, we must also adhere to its express words and remain mindful of its purpose." (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 864, fn. omitted.)

B. *Cavic's Cause of Action Against Green Arose Out of Protected Speech*

We first consider whether Green made the required threshold showing that the cause of action Cavic alleged against him arose from activity protected by the anti-SLAPP law.

Cavic alleged that Green "on multiple occasions prior to trial, communicated directly with [Cavic's expert]" and "during his communications with [the expert], Green successfully persuaded [the expert] to change his estimate of damages" Moreover, "during his communications with [the expert], Green successfully persuaded [the expert] not to appear at trial on behalf of [Cavic.]"

Such communication falls squarely within section 425.16, subdivision (e), which states that protected activity under the anti-SLAPP law includes “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law”

Cavic, however, characterizes the gravamen of his claim against Green as something other than mere speech. He views Green’s misconduct as “*a scheme to interfere with an opposing party’s expert witness to prejudice their case and the conduct of actually carrying that scheme out*” (italics added) and argues that such a scheme is not a protected communication under the litigation privilege (Civ. Code. § 47, subd. (b)) or the anti-SLAPP law. But scheming is a conclusory characterization rather than a specific act, and Cavic never specifies what Green did to carry out his scheme, other than *communicate* with Cavic’s expert witness.² Cavic also emphasizes that Green’s “intention was to sabotage [Cavic’s] underlying case by sabotaging his relationship with his expert witness . . . to gain an unfair advantage at trial.” But in determining whether the anti-SLAPP law applies, it is Green’s *acts*, not his intentions, which are relevant.

Finally, Cavic points to a line of cases holding that certain causes of action alleged against attorneys do not “arise out of” protected activity under the anti-SLAPP law, when the cause of action is based on a breach of some independent duty (e.g., an attorney’s breach of loyalty) and is merely *evidenced* by protected conduct. (See *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264; *Freeman v. Schack* (2007) 154 Cal.App.4th 719; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179.) However, those cases are distinguishable from this one for two reasons: First, in each of those cases, the attorney was being sued by his own client, not

² Cavic otherwise characterizes Green’s alleged wrong as “making ex-parte contract [*sic* “contact”] to secure information from [Cavic’s] expert witness.”

the opposing party in the underlying litigation. And as explained in *Kolar*, the client in a malpractice case “is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client’s interests while doing so.” (*Kolar v. Donahue, McIntosh & Hammerton, supra*, 145 Cal.App.4th at pp. 1539-1540.) And second, the only duty allegedly breached by Green in this case was his alleged duty *not to communicate* with an opposing expert. Hence, by contrast to the cases Cavic relies upon, here it was the alleged communication itself which constituted the breach. Because these cases are inapposite, they are of no help to Cavic.

C. *Green’s Communications Did Not Fall Within the “Commercial Speech Exemption” to the Anti-SLAPP Law*

Cavic also contends Green’s alleged communications with the expert witness fell within the “commercial speech exemption” to the anti-SLAPP law. (See *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22.) He is incorrect.

The commercial speech exemption is found in Code of Civil Procedure section, subdivision 425.17(c), and applies only “*if both of the following conditions exist:* [¶] (1) The statement or conduct consists of representations of fact about that person’s or a business competitor’s business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services, or the statement or conduct was made in the course of delivering the person’s goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or prospective buyer or customer, . . .” (Italics added.)

Neither of those conditions is met here. Cavic does not allege Green’s communications with Squar included representations of fact about his own or a competitor’s goods or services; that he made any representations to promote his goods or services; or that the intended audience (presumably Squar) is either an actual or potential

customer of his, or is likely to repeat what he allegedly said to an actual or prospective customer. Stated plainly, there is nothing about what Cavic alleged here that would bring his cause of action against Green within the commercial speech exemption of the anti-SLAPP law.

We conclude the trial court did not err in determining Cavic's cause of action against Green arose from activity protected by the anti-SLAPP law.

D. *Cavic Failed to Demonstrate a Probability of Prevailing on the Merits of His Cause of Action*

Once Green established that Cavic's cause of action against him arose out of activity protected by the anti-SLAPP law, the burden shifted to Cavic to demonstrate a probability he could prevail on the merits of his claim. "In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), . . . the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

Here, although Cavic's cause of action was styled "Legal Malpractice – Interference with Attorney-Client Relationship," he argued in the trial court that it more accurately stated a claim for intentional interference with contractual relations. He makes the same assertion on appeal.

"The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citations.]" (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

Thus, to survive Green's anti-SLAPP motion, Cavic was obligated to present evidence sufficient to sustain a factual finding in his favor on each of these elements. His evidence fell significantly short of that mark. Specifically, Cavic offered no evidence that Green had engaged in any intentional acts "designed to induce a breach or disruption of [any] contractual relationship" Cavic had in the underlying case. The evidence demonstrated only what Green himself had already admitted in his motion – i.e., that he contacted Cavic's expert witness in the underlying case, with the permission of Cavic's counsel, to schedule a date for the expert's deposition. And then after the deposition concluded, Green again contacted the expert directly, to request a copy of a report the expert had prepared in a similar case discussed during the deposition. The expert did not wish to communicate with Green directly, and informed Cavic's counsel of that preference. Thereafter, Green and Cavic's counsel had a disagreement about whether it was proper for Green to contact the expert directly.

That is the entirety of the evidence. Of course, Cavic's declaration in opposition to the anti-SLAPP motion goes on to assert, in conclusory fashion, that "[w]hen attorney Todd Green made the . . . multiple ex parte contacts with my expert witness Richard Squar to demand the production of documents and asking for information, *he did some conduct or action that caused my expert witness to reduce his initial damages estimate and then decide[] not to testify at all*, causing me harm to my case." (Italics added.) But that conclusory assertion amounts to nothing but pure speculation. All any court could conclude, based on that declaration, is that Cavic himself has no idea why Squar reduced his initial damages estimate in the underlying case, and later declined to testify at all. Such evidence is insufficient, as a matter of law, to satisfy Cavic's burden of establishing a probability *he could prevail* on his claim against Green.

Based on the foregoing, we conclude the trial court acted properly in granting the motion.

III

DISPOSITION

The order is affirmed. Cavic is to bear his own costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.